THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No: CV2017-03494

BETWEEN

BRITISH-AMERICAN INSURANCE COMPANY LIMITED

Claimant

AND

LAWRENCE DUPREY

Defendant

Before the Honourable Mr. Justice R. Rahim

Appearances:

Mr. B. McCutcheon instructed by Mr. A. Rudder and for the claimant

Mr. V. Lakhan-Joseph instructed by Ms. P. Ramsahai for the defendant

Decision

1. On the 28th February, 2018 the claimant filed a Notice of Application seeking the following relief;

    i. That the defendant's Defence be struck out pursuant to Part 26.2(1)(c) of the CPR as it discloses no or no reasonable grounds for defending the claim; and/or

    ii. Judgment be entered in favour of the claimant on the claim pursuant to Part 15.2(a) of the CPR; and

    iii. The defendant do pay the costs of the claimant on the prescribed basis.

2. In support of the claimant's application, the following affidavits were filed;

    i. Affidavit of Juan M. Lopez sworn to and filed on the 28th February 2018 ("the Lopez Affidavit"); and

    ii. Affidavits of Ms. Traci H. Rollins sworn to and filed on the 28th February 2018 ("the first Rollins Affidavit") and the 18th April, 2018 respectively ("the second Rollins Affidavit").

3. In opposition to the application, the defendant swore to and filed an affidavit on the 4th April, 2018.

Background

4. The court makes no findings of facts but has narrated the facts as set out by the parties herein to provide important background information for the purpose of understanding the claim and the competing arguments.

5. The claimant is a limited liability company incorporated under the laws of the Commonwealth of the Bahamas with its registered office located at the office of Lennox

Paton Corporate Services Limited, 3 Bayside Executive Park, West Bay Street and Blake Road, P.O. Box N-4875, Nassau Bahamas. The defendant was at the material time a director of the claimant.

6. On the 22nd December, 2011 the claimant filed proceedings against the defendant in the United States Bankruptcy Court, Southern District of Florida, West Palm Beach Division ("the Florida Bankruptcy Court"). The proceedings concerned breaches of fiduciary duties owed to the claimant by the defendant ("the Florida proceedings").

7. On the 6th January, 2012 the defendant was served with the Florida proceedings. According to the claimant, the defendant submitted to the jurisdiction of the Florida Court and/or participated in the Florida proceedings either in person or through Counsel.

8. On the 29th November, 2016 the Florida Bankruptcy Court entered an Agreed Order in the Florida proceedings ordering that judgment on liability be entered against the defendant. Trial on damages took place on the 20th July, 2017 and the Florida Bankruptcy Court ordered and adjudged that a final judgment for the sum of USD $122,636,450.34 be entered in favour of the claimant against the defendant ("the Judgment").

9. According to the claimant, as the defendant did not file an appeal against the Judgment and the time for doing so has passed, the Judgment is a final order of the Florida Bankruptcy Court.

10. Consequently, by Claim Form filed on the 3rd October 2017, the claimant claims that the defendant is indebted to it. The claimant therefore seeks the following relief;

    i. The sum of USD$122,636,450.34;

    ii. Interest pursuant to 28 U.S. Code §1961 at the rate of 1.23% per annum on the sum of USD$122,636,450.34 from the 1st August 2017 to 29th September 2017 in the sum of USD$247,960.82;

iii. *Interest pursuant to section 25 of the Supreme Court of Judicature Act, Chap. 4:01 on all sums found due to the claimant at such rate and for such periods as the Court shall deem just;*

iv. *Costs; and*

v. *Such further relief as the Court deems just.*

11. It is to be noted that the judgment obtained in the United States of America cannot be registered in this jurisdiction under the **Judgments Extension Act** Chap 5:02, there being no reciprocal agreement between this territory and the USA, the USA not being a Commonwealth nation.

12. By Defence filed on the 8th December 2017, the defendant claims that the Judgment of the Florida Bankruptcy Court was obtained in a manner which contravened the principles and tenets of natural justice in this jurisdiction. The defendant avers that the claimant's statement of case does not accurately depict the full matters which occurred in the Florida proceedings. That while the claimant attempts to paint a picture of non-compliance by him in the Florida proceedings, he was at various times physically unwell or impecunious to the extent he could not afford to continue to retain legal counsel to defend his claim.

13. The defendant further avers that he was only made aware of matters which formed the subject of complaints in the Florida proceedings at a belated stage of the transactions. That it was only when he was served with a Motion for Default Judgment that he realized the stage at which the proceedings had reached and he filed a Response in Opposition to the Motion. According to the defendant, the Florida Bankruptcy Court found that the default application could have been upheld and so the defendant filed his objections to the Florida Bankruptcy Court's findings before a Higher Court, the Eleventh Circuit.

14. The Eleventh Circuit upon hearing both parties on the issues recommitted the matter to the Florida Bankruptcy Court's Judge with instructions to hold an evidentiary hearing. The defendant claims that despite the Eleventh Circuit Judge's determination, the Florida Bankruptcy Court's Judge entered the Agreed Order on the 29th November, 2016. As such,

in relation to the Agreed Order, the defendant avers that he has no recollection of agreeing to a position whereby he accepted liability. That had he done so, same would have completely contrary to his position and intended Defence in the Florida proceedings.

15. Further, the defendant avers that he was deprived of the opportunity to challenge the extent of the damages being claimed by the claimant. That he was unaware that a date had been set for the trial on damages. On the 9th May, 2017 the defendant was constrained to file a Notice of unavailability and motion for continuance due to the expiration of his passport in May 2017 which inhibited him from travelling to the United States of America from Trinidad.

16. The defendant claims that despite the Florida Bankruptcy Court being cognizant of the aforementioned, it proceeded to adopt an unduly prejudicial approach by not only proceeding with the Pre-Trial Hearing but by also setting a trial date within four weeks of the date he expressly stated that he would have been unavailable. According to the defendant, the adoption of such procedure by the Florida Bankruptcy Court has had the unfortunate consequence of denying him a full, proper or any opportunity to defend himself at the trial of the assessment of damages which in turn amounted to a breach of natural justice.

17. Moreover, the defendant avers that the claimant compromised its claims against other defendants for *de minimis* amounts in 2014 and 2015 on the condition that those defendants would co-operate with the claimant in future legal proceedings.

18. The court notes at this stage that at paragraph 3 of his affidavit in opposition the defendant abandons all other defences filed save and maintains only the defence of the absence of natural justice. His exact words were;

"…in particular I no longer wish to pursue my defenses (sic) as they relate to the issues of public policy and the challenging of the jurisdiction of the Florida Court".

The issues

19. The issues for determination are as follows;

    i. Whether the Defence of the defendant discloses no grounds for defending the claim; and
    ii. In the alternative, whether the claimant should be granted summary judgment against the defendant.

Law & Analysis

20. The law on striking out and summary judgment are well established and there is no dispute between the parties on the applicable principles. ***Part 26.2(1) (c)*** of the CPR empowers the court to strike out a Defence for disclosing no reasonable grounds for bringing or defending a claim and ***Part 15.2(a)*** of the CPR empowers the court to give summary judgment on the whole or part of the claim if the defendant has no realistic prospect of success on his Defence or part of the Defence. Consequently, there is an important difference between the tests which the court is to apply under Rule 26 and Rule 15 of the CPR.

21. In ***University of Trinidad and Tobago v Professor Kenneth Julian and Ors***[1] my brother Kokaram J had the following to say on the difference between the two tests;

    "6. There is of course a fundamental difference between the two tests under CPR rule 26 and rule 15. When invoked simultaneously by a party the Court is engaged in an exercise of testing and assessing the strengths of the Claimant's case on what I will term a "soft" and then a more rigorous standard. If a claim discloses some ground for a cause of action it is not "unwinnable" and should proceed to trial. It may be a weak claim but not necessarily a plain and obvious case that should be struck out and the claimant "slips past that door". The Court is however engaged in a more rigorous exercise in a summary judgment application to determine of those weak cases, which may have passed through

[1] CV 2013-00212

the "rule 26.2 (c) door" whether it is a claim deserving of a trial, whether the evidence to be unearthed supports the claim and whether there is a realistic as opposed to fanciful prospect of success. If there is none, the door is closed on the litigation and brings an end to its sojourn in this litigation"

22. The court finds that it is appropriate to deal with the more rigorous exercise of determining whether the claimant should be granted summary judgment against the defendant since if that issue is answered in the affirmative, it may be decisive of the two issues when the other test is applied.

23. In ***Western Union Credit Union Co-operative Society Limited v Corrine Amman***[2] Kangaloo JA in dealing with a summary judgment application had the following to say at paragraph 3;

"The test to be applied in dealing with applications for summary judgment is contained in Part 15 of the CPR…It may be that the bar has been raised in so far as the CPR imposes a test of realistic prospect of success whereas Order 14 of the Rules of the Supreme Court 1975 the court only had to determine whether there was an arguable defence. The principles to be applied with applications for summary judgment have been recently set out Breason J. in Toprise Fashions Ltd v Nik Nak Clothing Co Ltd, Nik Nak (1) Ltd, Anjum Ahmed[3]*. In his judgment the following passage from the case of Federal Republic of Nigeria v Santolina Investment Corp*[4] *is re-produced:*

i. The court must consider whether the Defendant has a realistic as opposed to fanciful prospect of success: Swain v Hillman [2001] 2 AER 91;

ii. A realistic defence is one that carries some degree of conviction. This means a defence that is more than merely arguable: ED &F Man Liquid Products and Patel [2003] EWCA Civ 472 at 8;

[2] CA 103/2006
[3] [2009] EWHC 133 (Comm) at para 16
[4] [2007] EWHC 137 (CH)

iii. *In reaching its conclusion the Court must not conduct a "mini trial": Swain v Hillman;*

iv. *This does not mean that the court must take at face value and without analysis everything the Defendant says in his statements before the court. In some cases it may be clear there is no real substance in the factual assertion made, particularly if contradicted by contemporaneous documents: ED & F Man Liquid Products v Patel EWHC 122;*

v. *However in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment but also the evidence which can reasonably be expected to be available at trial Royal Brompton NHS Trust v Hammond (No 5) [2001] EWCA Cave 550;*

vi. *Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd [2007] FSR 63."*

24. The court is concerned with whether the defendant's defence that the judgment in the Florida proceedings was obtained in a manner which contravened the principles of natural justice has a realistic prospect of success. Although the court is not tasked to conduct a mini trial, consideration of the evidence before the court on the application, including any contemporaneous documents, and the evidence that can reasonably be expected to be available at trial is important.

25. In ***Superior Composite Structures LLC v Malcolm Parrish***[5] (a case relied upon by the defendant), Mrs. Justice McGowan had the following to say at paragraph 4;

[5] [2015] EWCH 3688 (QB)

"The enforcement of a foreign judgment is a matter of common law in the absence of any treaty agreement. There is no such treaty with the United States of America. A foreign judgment for a definite sum, which is final and conclusive on the merits, is enforceable by claim and is unimpeachable (as to the matters adjudicated on) for error of law or fact. This is subject to four material exceptions. It may be impeached for fraud; if the proceedings leading to the judgment were contrary to natural justice; if its enforcement would be contrary to public policy and if it relates to a tax, fine or other penalty…"

26. In ***OJSC Bank of Moscow v Andrey Valerievich Chernyakov & Ors***[6] (a case relied upon by the claimant) Cranston J had the following to say at paragraphs 8 & 9;

"As to natural justice, first, a defendant must be given the opportunity so that they can put their case in response: Jacobson v. Frachon (1927) 138 L.T. 386; Adams v. Cape Industries Plc [1990] Ch 433, 563G. A mere procedural defect in the proceedings will not be sufficient. What is required is a substantial denial of justice: Aeroflot v. Berezovsky [2012] EWHC 3017 (Ch), [54], per Floyd J. However, a defendant must take all available defences in the foreign court and if they are at fault in not doing so, may not impeach the foreign judgment in England: Israel Discount Bank v. Hadjipateras [1984] 1 WLR 137 , 144 C-H, per Stephenson LJ. A corollary of this is that a defendant may not impeach a foreign judgment by raising defences before the English court where the foreign court has considered and rejected them.

Secondly, the defendant must be given notice of the hearing so she is able to put her case. It is not contrary to natural justice that a person "who has agreed to receive a particular mode of notification of legal proceedings should be bound by a judgment in which that particular mode of notification has been followed, even though he may not have had actual notice of them": Valle v. Dumergue (1849) 4 Exch 290 . If there was service of the notice of hearing on the party in accordance with the relevant foreign law, but actual notice was not given, the question will be whether substantial injustice was caused by the lack of notice, including whether the defendant had a remedy in the foreign court: see Dicey, para.

[6] [2016] EWHC 2583 (Comm)

14-166. Also where an alleged procedural irregularity has been raised before the foreign court, and rejected by it, it is less likely that an English court will entertain arguments on natural or substantive justice that are based on it: Dicey, para.14-167."

27. The defendant has accepted that the claimant did initiate proceedings against him in the Florida Bankruptcy Court. He further accepted that he was served with the Florida proceedings on the 6th January, 2012. At paragraph 20 of his Defence, the defendant averred that he had no recollection of the Agreed Order entered by the Florida Bankruptcy Court on the 29th November, 2016.

28. The Agreed Order on Motion to vacate Clerk's Default and Motion for Default Judgment dated the 29th November, 2016 ("the Agreed Order") provided as follows[7];

"… The Motion for Judgment and the Motion to Vacate were argued before the Court on November 13, 2015 and the Court issued Proposed Order on Motion to Vacate Clerk's Default and Motion for Default Judgment [ECF no. 435] (the "Proposed Order") on December 8, 2015. Mr. Duprey objected to the Proposed Order and said objection was sustained by the District Court with the matter recommitted to the Court to conduct an evidentiary hearing for December 1, 2016. In the interim, Mr. Duprey and BAICO attended mediation and reached an agreement on how to proceed. The Court, having reviewed the Motion for Judgment and the Motion to Vacate, being advised of the agreement of BAICO and Mr. Duprey and being otherwise fully advised in the premises, hereby:

ORDERS AND ADJUDGES that:

1) The evidentiary hearing…is cancelled.

…

4) as the defendants, Brain Branker and Lawrence Duprey, did not timely respond to the Amended Complaint…each allegation contained therein is deemed proven as against such defendants and judgment shall be entered against defendants Brain Branker and Lawrence Duprey as to liability only…

[7] See at Tab E 30 at of the claimant's statement of case

5) A trial shall be conducted to establish the amount of damages as against Lawrence Duprey and Brian Branker.

…

7) The Court shall conduct a pretrial conference on May 10, 2017 at 9:30 a.m. at the United States Bankruptcy Court…"

29. Although at paragraph 9 of his Defence, the defendant admitted the authenticity of the Agreed Order, he submitted that he was not apprised of nor did he understand the purportedly agreed position, its contents and/or effect until the consequences of same was explained to him during these proceedings. The defendant further submitted that he vehemently refuted the contents of order, that he does not recall ever accepting liability in any such mediation and that had he so agreed, same would have been in direct contravention of the defences he had placed before the Florida Bankruptcy court some months earlier in relation to the Motion for Default Judgment. The court agrees with the claimant's submission that there is nothing strange in a party to a litigation changing his position and that in these very proceedings the defendant in his affidavit has made a number of concessions contrary to his pleadings.

30. The court noted that at the time of the entering of the Agreed Order, the defendant was represented by an attorney-at-law (on the 23rd February, 2017 the defendant's then attorney –at-law was granted permission to withdraw from the Florida proceedings). The court therefore finds that it was highly unlikely that the defendant and/or his attorney–at-law would have agreed to liability without same being discussed and/or explained to the defendant. The court further noted that defendant filed a Notice of Unavailability and motion for continuance to excuse his absence in the pretrial conference set for the 10th May, 2017. The filing of that Notice of Unavailability depicted to the court that the defendant was aware of the contents of the Agreed Order entered by the Florida Bankruptcy Court on the 29th November, 2016. The court therefore finds that the defendant's defence of lack of recollection of agreeing to liability has no reasonable prospect of success in proving that the Agreed Order was obtained in a manner which contravened the principles of natural justice.

31. By the Notice of Unavailability and Motion for Continuance filed by the defendant on the 9th May, 2017 the defendant sought a continuance of the pretrial conference scheduled for the 10th May, 2017 at 9:30am. Attached to the Notice was an affidavit sworn by the defendant on the 8th May, 2017.[8] At paragraph 3 of the affidavit, the defendant deposed as follows;

"I have applied to the Passport Office in Trinidad for renewal of my passport however the application is still pending. I am informed by the Passport Office that my passport will not be ready for another 8 weeks."

32. The defendant claimed that the Florida Bankruptcy Court denied his motion to continue the pretrial conference even though he would not have been able to attend. The court noted that although the Florida Bankruptcy Court denied the motion to continue the pretrial conference,[9] it fixed the trial for the assessment of damages for the 20th July, 2017 ***which was a date beyond*** that which the defendant deposed he would not have a passport.[10]

33. At paragraph 29 of his Defence, the defendant averred that he was not aware that a date had been set for the assessment of damages as he was not informed by the court of same and furthermore relied on the fact that he had dutifully provided the court with an explanation for his unavailability in May, 2017 and sometime thereafter.

34. The defendant submitted that he was unaware that his previous attorneys at law had represented in the Florida Proceedings that he would accept service of documents from the Court or from the Attorney at Law for the claimant via email. The defendant in his affidavit particularized that he was not a tech savvy person and that to this day he requires assistance with utilizing electronic mail.

35. The defendant further submitted that he was not expecting to receive Order dated the 11th May, 2017 which set the trial date for the assessment of damages for the 20th July, 2017

[8] Copies of the Notice and the affidavit were attached to the Statement of Case at Tab E, 41.
[9] A copy of the Order dated 9th May, 2017 was annexed to the Statement of Case at Tab E 42.
[10] A copy of this Order dated May 11, 2017 was attached to the Statement of Case at Tab E 42.

via email since same was of grave importance as it related to a full trial. That he sent no acknowledgment of service and no further efforts were made by the Court or the claimant to ensure that he had received the contents of the said email. According to the defendant, by paragraph 18 of the Rollins Affidavit, the claimant seemed to suggest that the sending of the email alone and without more, was sufficient for all purposes and that this court should effectively turn a blind eye to such matters. The defendant submitted that that would be exceptionally unfair if taken at face value and therefore ought not to be accepted.

36. On 23rd February 2017, the Florida Bankruptcy Court made an Order granting the motion of the defendant's then attorneys to withdraw as counsel.[11] The Order stated inter alia as follows;

"…electronic service upon the Client at the email address lamduprey@yahoo.com shall be deemed effective service until such time as the Client files a notice in this proceedings stating that he shall accept service by first class mail postage prepaid at a domestic address within the United States of America."

37. In her second affidavit, Rollins testified that a copy of the said Order of the 23rd February, 2017 was sent by mail to the defendant's home address in Ft. Lauderdale, Florida, USA and to his Trinidadian address.[12] Rollins further testified that Order dated the 11th May, 2017 was duly served on the defendant via his email address.[13]

38. The claimant submitted that this court ought to treat with caution the defendant's pleas that he did not know that service of the documents in the Florida Bankruptcy Court would be by email and that he did not see the emails since the documents at numbers 39, 40 and 41 of Exhibit E attached to the Statement of Case are evidence of the fact that the defendant would serve documents on the claimant's Attorneys-at-Law via his email lamduprey@yahoo.com. The court agrees with this submission.

[11] A copy of the Order was annexed to the Statement of Case at tab E 37.
[12] A copy of the certificate of service issued by the defendant's former Counsel in the Florida Proceedings was annexed to Rollin's second affidavit at "T.R.3".
[13] A copy of the certificate of service was attached to Rollins first affidavit at "T.R.2."

39. The defendant submitted that although on occasion he received and/or replied to court correspondence by email, same without more cannot be taken to be an outright acceptance by him of having email be deemed as effective service. In his affidavit, the defendant testified that the email system may not have been completely problematic when he had attorneys on record as the attorney would have notified him as to the court documents which were being served. That at the times he had no legal representation on record, he would have faced serious restrictions. The court notes however that at the time of the submission of the documents at numbers 39, 40 and 41 of Exhibit E attached to the Statement of Case via email, the defendant was not represented by counsel.

40. Consequently, the court finds that the defendant's claims of being unaware of the email was disingenuous. That upon filing the motion to continue the pretrial conference, it was incumbent upon the defendant to find out whether same was granted or denied since he had knowledge of the Florida proceedings. As such, the court finds that the defendant's defence of not having knowledge of the date set for the assessment of damages and that service of the Order dated the 11th May, 2017 via his email was inappropriate has no reasonable prospect of success in proving that the final judgment of the Florida Bankruptcy proceedings was obtained in contravention of the principles of natural justice. On the face of it the defendant had every opportunity to be heard. It is highly likely that should this case go to trial the evidence to be led and that which this court may reasonably anticipate will not assist the defence in that regard.

41. Moreover, the defendant claimed that the claimant's agenda in the Florida Proceedings was to settle its matters with other defendants for *de minimis* amounts on the condition that those defendants would cooperate with the claimant in future legal proceedings. The court agrees with the submission of the claimant that it was not a breach of natural justice for it to settle other disputes and continue proceedings against the defendant. That was a privilege and option available to the claimant.

42. In addition to the circumstances as outlined above, the defendant submitted that in the Florida Proceedings, the Judge adopted wholesale what the claimant's position on damages

was without further investigation or contest. According to the defendant, that was in direct contravention of the tenets of natural justice. The defendant further submitted that the claimant has failed and/or neglected to provide this court with any or the full particulars as to what representations were made by it and the full events as to what transpired on the date of the assessment of damages. According to the defendant, full particulars of what transpired on the date of the assessment would have been particularly important given that it was only the claimant herein and not the defendant nor this court which would have been present or privy to events on that material date.

43. The court does not agree with the above submissions of the defendant. Upon the face of the Final Judgment dated the 31st July, 2017 it was stated that when the matter came up for trial the judge in the Florida proceedings heard arguments from counsel and presentation of evidence of the plaintiff. As such, it is reasonable to infer that it was on that basis the Judge in the Florida proceedings awarded the damages in the sum of $122,636,450.34 against the defendant.

44. The defendant admitted that he did not file an appeal against the foreign judgment. The defendant submitted that there were several financial and health constraints and/or factors which limited his ability to lodge an appeal within the necessary time. In his affidavit, the defendant testified that he is not in possession of medical reports to substantiate the medical issues he faced. The court therefore agrees with the submission of the claimant that the defendant did not plead any particulars of the illnesses and/or lead any corroborative evidence of his illnesses and/or when or how his illnesses affected his participation in the Florida proceedings.

45. Consequently, when the court considers 1) the matters accepted in the defendant's Defence, 2) the evidence before the court on the application, including the contemporaneous documents, 3) the evidence that can reasonably be expected to be available at trial and what was discussed in paragraphs 25 to 42 above, the court finds that the defendant has no realistic prospect of success on his Defence.

46. For these reasons, the decision of the court is therefore as follows;

a) Judgment for the claimant in the following terms;
    i. The defendant shall pay to the claimant the sum of USD$122,636,450.34;
    ii. The defendant shall pay to the claimant interest pursuant to 28 U.S. Code §1961 at the rate of 1.23% per annum on the sum of USD$122,636,450.34 from the 1st August 2017 to 29th September 2017 in the sum of USD$247,960.82;
    iii. The defendant shall pay to the claimant interest at the rate of 2.5% per annum on the sum of USD$122,636,450.34 from the 3rd October, 2017 to the 27th September, 2018.
b) The defendant shall pay to the claimant 55% of the prescribed costs of the claim.
c) The defendant shall pay to the claimant the costs of the application to be assessed by this court.

Dated this 27th day of September 2018

Ricky Rahim
Judge